MUHAMMAD ATAM ABDUL WAHAB

v.

MINISTER OF HOME AFFAIRS & ANOR

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: MT(3)44-19-2000]
8 NOVEMBER 2000

CRIMINAL PROCEDURE: *Habeas corpus - Detention of drug addict - Proper procedure - Order referred to treatment and rehabilitation but not to supervision - Whether order in accordance with proper procedure - Drugs Dependants (Treatment and Rehabilitation) Act 1983, s. 6*

The applicant had been detained under the Drugs Dependants (Treatment and Rehabilitation) (Amendment) Act 1983 ('the Act'), pursuant to an order pronounced by the magistrate on 13 September 2000.

The applicant claimed that the order pursuant to s. 6(1)(b) of the Act was flawed as the magistrate had failed to specify the relevant party that was supposed to supervise the applicant after his release from detention.

The issue for consideration was whether an order of *habeas corpus* could be granted in the circumstances of the case, bearing in mind that such an order is specifically reserved for illegal detentions, as envisaged by art. 5(2) of the Federal Constitution.

Held:

[1] A perusal of s. 6(1)(a) of the Act will indicate that an order meted out by a magistrate must contain two distinct forms of sanction; (i) a confinement at a rehabilitation centre for a period of two years, purposefully for treatment and rehabilitation; and (ii) a further supervision by an officer at the place specified in that order, after the aggrieved party's release. The confinement and supervision requirement must go hand in hand, though the effective dates of those two prescribed sanctions are only to take effect at different points of time.

[1a] Although there is no definition of 'supervising officer' referred to in s. 6(1)(a) of the Act, the statutory format that requires adherence by the presiding magistrate expands the scope of that terminology of 'officer' to encompass a rehabilitation officer, a police officer, a provost officer and a commanding officer.

[1b] The disclosure of the identity of the supervising officer is not just to assist but a right entrenched in the Act to enable him to locate that officer.

[2] The order issued by the magistrate disclosed that the relevant supervising officer was not identified, thus jeopardising the applicant's well-being after his release. The applicant would not know to whom to report to after his release. In the event he failed to report to anyone, the applicant would become a potential target of a prosecution. The applicant's rights and interests therefore would be compromised and prejudiced as his personal liberty was inextricably intertwined with the supervision factor.

[Application allowed.]

Case(s) referred to:

AL Annamalai & Anor v. Chandrasekaran Thangavelu & Anor [1999] 8 CLJ 1 ***(refd)***

Aw Ngoh Leong v. Inspector General of Police & Ors [1993] 1 CLJ 373 ***(refd)***

Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors [1985] 2 CLJ 196 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129 ***(refd)***

Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1991] 2 CLJ 1301 ***(refd)***

Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam [1993] 4 CLJ 336 ***(refd)***

Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 2 MLJ 245 ***(refd)***

Mok Han Liang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [1996] 3 CLJ 122 ***(refd)***

Ram Manohar Lohia & Ors v. State of UP & Ors [1968] Cr LJ 281 ***(refd)***

Re Onkar Shrian [1970] 1 MLJ 28 ***(refd)***

Zahir Ahmad v. Ganja Prasad & Ors [1963] AIR Allahabad 4 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 394

Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1983, s. 6(1)(a), (b)

Federal Constitution, art. 5(2)

For the applicant - Wan Jawahir Harun; M/s Wan Jawahir & Co

For the respondents - Mohamed Abazafree Mohd Abbas FC

Reported by Mariette Peters-Goh

JUDGMENT

Suriyadi Halim Omar J:

On 8 November 2000 I heard this *habeas corpus* application, and eventually allowed it with costs. The background of this case was that the applicant had been detained under the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1983 (hereinafter referred to as "the Act"), pursuant to an order pronounced by the learned magistrate of Bachok, Kelantan on 13 September 2000. The applicant complained that that order, pursuant to s. 6(1)(b) of the Act was flawed and thus *void*. He alleged that the flaw came in the form of the non-specification by the learned magistrate of the relevant party that was supposed to supervise him after his release from detention at the Tampoi Rehabilitation Centre. By this failure his interest had been compromised and thus had prejudiced his person.

Interestingly enough, the complaint was only confined to the supervision matter *per se*, as the applicant never complained of the detention sanction. The legal poser that also attracted my attention was whether an order of *habeas corpus* could be granted in the circumstances of the case, bearing in mind that such an order is specifically reserved for illegal detentions, as envisaged by art. 5(2) of the Federal Constitution. Under the latter article the detainee is constitutionally entitled to be released before the High Court judge ie, after having successfully established that wrongful detention. With no complaint pertaining to the actual detention in this case being ventilated, and *habeas corpus* orders are only issued for illegal detentions, apart from the fact that at the point of time of the supervision he would be physically free, at first blush the application would appear to be a lost cause. The above predicament has had its fair share of controversy as reflected in certain case laws. In *Zahir Ahmad v. Ganja Prasad & Ors* [1963] AIR Allahabad 4, the High Court opined that the fact that a detainee had been released on bail, did not mean that he was free. That being so the *habeas corpus* application in that situation was in order. The latter case was subsequently approved by *Ram Manohar Lohia & Ors v. State of U.P & Ors* [1968] Cr. LJ 281. The matter was open wide again when Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28 disagreed with the above stance. He remarked:

> In my opinion this submission must also fail. The expression "who claims to be brought before the court" refers to a person who is in actual custody and who claims the right to be brought before the court to be dealt with according to law eg, a defendant in custody under a writ of attachment.

> Such a person can claim to be brought before the court to be dealt with according to law. It does not mean that any person can claim to be brought before the court. If that were so then every person who desired the opinion of the High Court on some question or matter could "claim to be brought before the court to be dealt with according to law." I have no doubt at all that only a person in actual custody whose case is not covered by paragraphs (a) and (b) can claim the right to be brought before the High Court because "brought before the court" means brought from actual custody.

Without making too much out of procedural matters pursuant to the Criminal Procedure Code, suffice if I opine that the issue discussed by Choor Singh J ie, the matter of bail, is adequately provided for under Chapter XXXVIII of the Criminal Procedure Code. Under s. 394, any person aggrieved by any order may appeal to the High Court, which may confirm, vary or reverse the relevant order. The remedy of *habeas corpus* clearly is not within its ambit. At the flip side of the coin, in contradistinction to criminal matters, in *AL Annamalai & Anor v. Chandrasekaran a/l Thangavelu & Anor* [1999] 8 CLJ 1, (a civil case substantially dealing with an adoption matter), I rejected the *habeas corpus* application there as the supposed kidnapped child, central in the adoption application, was in court when the proceedings were in session. As regards the *habeas corpus* remedy in relation to administrative law, it is trite law that when a person is subject to a restriction order signed by a Minister, such a remedy is not available to him. Suffice if I merely reproduce the remark of Abdoolcader SCJ in *Cheow Siong Chin v. Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 CLJ 196 where he said:

> On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of the writ of *habeas corpus*.

It was based on all the above considerations, bearing in mind that the matter at hand was a quasi-criminal matter, what with the overall effect of a flawed order that could prejudice the interest of the applicant, and no less important the issue of whether the learned magistrate had consciously applied his mind when pronouncing that impugned order, I resolved not to dismiss the matter off-handedly.

To understand the matter at hand, it is rather pertinent for me to reproduce s. 6(1)(a) of the Act. It reads as follows:

> 6. (1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence to such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations –
>
> order such person to undergo treatment and rehabilitation at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years.

A brief perusal of the above provision will indicate that an order meted by a magistrate must contain two distinct forms of sanctions *viz,* a confinement at a rehabilitation centre for a period of two years, purposefully for treatment and rehabilitation, and a further supervision by an officer at the place specified in that order, after the aggrieved party's release. In a gist the confinement and the supervision requirement must go hand in hand, though the effective dates of those two prescribed sanctions only to take effect at different points of time. The above provision unfortunately does not clarify that particular supervising "officer". Even a scrutiny of s. 2 confines the definition of "officer" to "any Rehabilitation Officer or any police officer" and no further. Yet the statutory format that requires adherence by the presiding magistrate expands the scope of that terminology of "officer" to encompass a rehabilitation officer, a police officer, a provost officer and a commanding officer. Clearly this unsatisfactory definition needs immediate attention from the relevant authority. A choice will have to be made by the learned magistrate here, with the irrelevant portion in the statutory form to be administratively deleted prior to pronouncing the order. To appreciate this problem, a reading of that format which is found at the rear portion of the Act referred to as FORM 3, is a must. I now reproduce it:

Form 3

Drug Dependants (treatment and rehabilitation) Act 1983

(Paragraph 6(1)(a) and subsection 6(2)

ORDER TO UNDERGO TREATMENT AND REHABILITATION AT A REHABILITATION CENTRE AND TO UNDERGO SUPERVISION

Whereas ...

Identity Card No ... aged ... years of ...

(hereafter referred to as "the said person"), is certified by ...

... a *government medical officer/registered medical practitioner to be a drug dependant within the meaning of the Act:
And whereas upon the recommendation of the Rehabilitation Officer, And after giving the said person an opportunity to make a representation

I, ... a Magistrate at ...

order the said person –

(a) to undergo treatment and rehabilitation at ... Rehabilitation Centre for a period of two years; and

(b) thereafter to undergo supervision by *Rehabilitatin Officer/police officer/provost officer/commanding officer for a period of two years under the following conditions:

(i) the said person shall reside in the area of ...;

(ii) the said person shall at all times inform the officer of his place of residence and shall not change his place of residence or leave the area where he resides without the written permission of the Director General;

(iii) the said person shall report at the ... (as designated) by the Magistrate) not later than 72 hours after his discharge from the rehabilitation centre and on the ... of every calendar month between 6.00 a.m. and 6.00 p.m.;

(iv) the said person shall not consume, use or possess any dangerous drugs;

(v) the said person shall undergo such tests at such time and place as may be ordered by the officer; and

(vi) the said person shall undergo any programme for the rehabilitation of drug dependants held by the government.

Given under my hand and the seal of the Court at ... on ... .

...
(Magistrate)

The expansion of the scope of the supervising personality, to include a provost officer or commanding officer, is indisputably for the benefit of soldiers that have gone astray. The citation of those officers in the statutory form is in consonant with s. 6(2) of the Act, which makes mention of members of the Armed Forces. To summarise this provision, a detainee after his release, depending on his status or discretion of the learned magistrate, is statutorily required to be supervised by one of the four distinct

persons (s. 6(1)(a)). In this case it was quite clear to me that by the very failure of the learned magistrate to administratively delete the relevant portion of the typed order, the relevant supervising officer was not identified, thus jeopardising the applicant's well being after his release. Had the deletion taken place the unscathed required supervisor could easily have been identified.

To pursue the matter further, I could appreciate the dire predicament the applicant would find itself under after his release, in the event he failed to report to the correct person primarily to fulfill the second part of the order. Is he to report to a rehabilitation officer, a police officer, a provost officer or a commanding officer of some unknown unit in the Armed Forces? Any reasonable person could well imagine his confusion or dilemma due to the shortcomings of the order. It is established law that it is incumbent on the detaining authority, in this case the respondent to prove that the order is *ex facie* regular (*Karam Singh v. Menteri Hal Ehwai Dalam Negeri* [1969] 2 MLJ 129; *Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1991] 2 CLJ 1301). In this case, unfortunately due to the delay in filing the affidavit-in-reply by the respondent, resulting in it being rejected, the respondent was left without any rebuttal evidence. On the other hand, the respondent could not complain of being in a disadvantageous position, as in spite of its predicament it was never denied the opportunity to defend and justify the defective order from the Bar table. Sad to say, the respondent was hard pressed to convince me that the order was *ex facie* regular.

Furthermore, with the failure to comply with the second part of the order and through no fault of his, a prosecution by the public prosecutor would not be an improbability. Section 6(3) of the Act clearly reads:

> (3) any person undergoing supervision under paragraph (a) or (b) of subsection (1) who fails to comply with any condition imposed under subsection (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

Even if he were not to be prosecuted eventually, the fact that that probability did hang like the Sword of Damocles over his head for a long time, clearly would go against his welfare and interest. LC Vohrah J when reading out the Supreme Court judgment of *Aw Ngoh Leong v. Inspector General Police & Ors* [1993] 1 CLJ 373 took a step further when his Lordship adjudged:

> Any disobedience of the mandatory requirements for the protection of this right would vitiate any order of detention made **even if no real prejudice has ensued** to the detainee (emphasis added).

This court order, by analogy is no different to a detention order issued by a minister against anyone eg, pursuant to the Internal Security Act 1960. The Minister before signing the order, is expected to adhere to certain practices and standard, *inter alia*, to appreciate and apply his mind over the matter before taking the draconian step of confining a person without due process. Similarly, the magistrate is expected to consciously apply his mind over the matter, instead of robotically and in a cavalier manner just sign away the impugned order (*Mok Han Liang v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors* [1996] 3 CLJ 122; *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam* [1993] 4 CLJ 336). To wind up the matter suffice if I refer to the case of *Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 2 MLJ 245, where Lee Hun Hoe CJ Borneo at p. 251 said:

> Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where the personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

I further seek solace from a recent case of MT (1) 44-10-2000, which was heard by my learned brother YA Dato' Idris bin Yusof, whereupon a *habeas corpus* order was similarly granted. Likewise, in that case the learned magistrate had failed to delete the relevant portion. After having considered all the factors ventilated during the hearing I concluded, among others that:

i. the learned magistrate had not applied his mind over the matter of supervision, particularly on the factor of the relevant officer, when he failed to delete the irrelevant portion;

ii. the supervising officer had not been identified;

iii. by this failure to identify that officer the applicant would not know to whom to report after his release. The disclosure of the identify of the supervising officer is not just to assist but a right entrenched in the Act to enable him to locate that officer;

iv. in the event he fails to report to anyone, in order to comply with the second part of the order (and through no fault of his), the applicant would become a potential target to a prosecution. It was manifestly clear that

his rights and interest would be compromised and prejudiced by the lackadaisical attitude of the learned magistrate;

v. the personal liberty of the applicant was inextricably intertwined with the supervision factor;

vi. he was entitled to avail himself of any technical defects which could invalidate the order;

vii. at the point of time when the supervision becomes effective, he physically will be a free man; but

as the detention was not in accordance with the procedure established by the law, in that it was founded on a defective order, the applicant thus was entitled to his freedom.

Based on all the above factors I had no hesitation in allowing the application with costs.